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Supreme Court, U.S.
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No. 03-229

IN THE

Supreme Court of the United States

OTIS ELEVATOR COMPANY,

Petitioner,

v.

YASHARAY MACK AND LOCAL ONE, INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

ALLAN B. TAYLOR
Counsel of Record
KENNETH W. GAGE
DAY, BERRY & HOWARD LLP
CityPlace
Hartford, CT 06103
(860) 275-0100

Counsel for Petitioner

183814

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. The Petition Presents An Important Question Of Law As To Which The Courts of Appeals Disagree

• The Second Circuit itself flatly rejected Respondent Mack's suggestion (Br. in Opp'n at 5) that there is no conflict between the holding below and the rule followed by the Seventh Circuit. In the Seventh Circuit, as that court held in *Parkins v. Civil Constructors, Inc.*, 163 F.3d 1027 (7th Cir. 1998), and reiterated in *Hall v. Bodine Electric Co.*, 276 F.3d 345 (7th Cir. 2002), a corporate employee is not a supervisor for the purpose of imposing vicarious liability on the corporation unless he or she has "the authority to 'hire, fire, demote, promote, transfer, or discipline'" the victim. *Id.* at 355 (quoting *Parkins*, 163 F.3d at 1034). The Second Circuit acknowledged that "[i]t is undisputed that Connolly had no such authority with respect to Mack." (App. A at 16a.) Its holding that Connolly was Mack's supervisor as a matter of law, (App. A at 18a), therefore rests squarely on the Second Circuit's refusal to follow the rule adopted by the Seventh Circuit. *See* App. A at 17a ("We therefore conclude that the authority that renders a person a supervisor for purposes of Title VII analysis is broader than that reflected in the *Parkins* test").

• As a recent and extremely thorough district court opinion states, "[t]he definition of the term 'supervisor' for Title VII purposes is a question that has divided the courts." *Browne v. Signal Mt. Nursery, L.P.*, No. 1:01-CV-351, 2003 U.S. Dist. LEXIS 18018, at *15 (E.D. Tenn. Sept. 29, 2003). *Browne* recognizes the split between the majority of courts, which follow the Seventh Circuit, and the "minority of courts and the EEOC [which] have adopted a broader view defining a supervisor in terms of an individual's power or authority to adversely affect the victim's working environment and otherwise restrict the victim's freedom or ability to respond." *Id.* at *16. *Browne* christens the minority position "the *Mack*/EEOC definition of 'supervisor'." *Id.* at *22, *31; *see also id.* at *21 ("the *Mack*/

EEOC test"), *23 ("the *Mack*/EEOC rule"), *24 ("the *Mack*/EEOC approach"). This Court should decide whether the majority of courts or the minority that follow the "*Mack*/EEOC rule" are correct.

• This case squarely presents the difference between the conflicting rules. The Second Circuit found Connolly to be Mack's supervisor as a matter of law because "he had and exercised the authority to make and oversee the daily work assignments of the mechanics and mechanics' helpers at 200 Park, including Mack." (App. A at 18a.) That rationale adopts the statement in the EEOC's enforcement guidelines that an individual is a supervisor if "'[t]he individual has the authority to direct the employee's daily work activities.'" (App. A at 17a-18a (quoting *EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 8 Fair Emp. Prac. Manual (BNA) 405:7654 (1999))). The Seventh Circuit's definition of supervisor, however, recognizes only the first part of the EEOC's disjunctive test, that an individual is a supervisor if "the individual has authority to undertake or recommend tangible employment decisions affecting the employee." *Id.* Since Connolly concededly had no such authority, he is as a matter of law not a supervisor under the majority rule. The record here, therefore, requires a clear choice between the majority and the *Mack*/EEOC definitions.[1]

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1. Mack suggests that Connolly is a supervisor because of the asserted connection between his role in coordinating job assignments and the possibility of overtime pay. (Br. in Opp'n at 3-4.) Otis submits that the limited ability to affect overtime pay that even Mack suggests — that Connolly "would hand out assignments, which may or may not lead to overtime opportunities and he was specifically responsible for handing out certain overtime assignments," (*id.*) — does not constitute the ability to take a tangible employment action as that term is used in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In any event, the Second Circuit explicitly did not base its holding on Mack's role with regard to overtime, which it considered a disputed issue of fact. (App. A at 6a, 19a n.7.)

II. The Holding Below Is Inconsistent With This Court's Opinions In *Ellerth* And *Faragher*

• The question resolved in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), was when Congress intended an employer to be responsible for sexual harassment of one of its employees by another employee. The Court's answer recognized that Congress did not desire to impose vicarious liability on corporate employers for the actions of all of their employees; rather, Congress held corporations liable for the actions of employees to whom the corporation had delegated significant authority that aided them in their wrongful acts. *See Ellerth*, 524 U.S. at 763-64; *Faragher*, 524 U.S. at 791-92, 800-01. Relying on both "the virtue of categorical clarity," *Faragher*, 524 U.S. at 801, and the empirical observation that an employer has greater control over the limited population of supervisors than over the total body of its employees, *id.* at 803, the Court held that employers faced vicarious liability for harassment committed by supervisors. Supervisors, the Court explained, have "been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under [their] control." *Ellerth*, 524 U.S. at 762. That delegated corporate power, whether or not it was actually exercised, identified supervisors as employees for whose actions it was appropriate to hold the employer vicariously liable.

• Connolly is not a member of that "distinct class of agent" because he was not "empowered by the company . . . to make economic decisions affecting" Mack or to influence such decisions. Rather, the Second Circuit called him a supervisor because of his ability to direct Mack's day-to-day activities. In Mack's words, Connolly was a supervisor because "he directed Mack to tighten what bolts and grease what fittings he specified." (Br. in Opp'n at 3.) That same statement, however, could be made about every journeyman mechanic with whom Mack, a mechanic's helper or apprentice, worked. As the *Browne* court observed, "[t]he sheer numerosity of potential supervisors

under the *Mack*/EEOC rule is directly contrary to the Supreme Court's own understanding of what it was doing in *Ellerth* and *Faragher*." *Browne*, 2003 U.S. Dist. LEXIS 18018, at *23. By labeling as "supervisors" anyone who directs another employee's activities at work, even temporarily, (*see* Pet'n for a Writ of Cert. at 17-18 & n.22), the *Mack*/EEOC approach imposes vicarious liability without regard to the employer's inability to select carefully, train extensively, and closely monitor an indeterminate group that may include most of its employees. *But see Faragher*, 524 U.S. at 803 ("the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.") In so doing, the *Mack*/EEOC doctrine upsets the careful balance struck by Congress and implemented in *Ellerth* and *Faragher*.

• By imposing vicarious liability based on the actions of a broad and uncertain group of employees, the *Mack*/EEOC analysis also impedes the *Ellerth* and *Faragher* policy goal of maximizing the employer's incentive and ability to prevent Title VII violations. "The more nebulous the standard for determining which employees are supervisors, the less incentive there is for companies to engage in preventive forethought." *Browne*, 2003 U.S. Dist. LEXIS 18018, at *23.[2]

• Mack argues that the Seventh Circuit rule urged by Otis would allow employers to avoid liability by centralizing

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2. The pending petition for writ of certiorari in *Pennsylvania State Police v. Suders*, No. 03-95 (U.S., filed Jul. 14, 2003), presents similar policy concerns. The petition in *Suders* seeks review of a Third Circuit opinion, *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), which held that a constructive discharge constitutes a "tangible employment action" within the meaning of *Ellerth* and *Faragher*. In *Suders* as here, the lower courts are divided over the location of the line drawn by Congress and this Court around an employer's vicarious liability. In this case, that division concerns *for whom* the employer may be vicariously liable, a question that is closely linked to the issue of *for what* the employer may be vicariously liable that is raised in *Suders*.

decisions with respect to employee status in administrative officials with extremely limited contact with other employees. (Br. in Opp'n at 3, 5.)[3] The *Parkins* definition of supervisor, however, is not limited to corporate employees who can on their own accord take a tangible employment action; it also considers as a supervisor anyone who can recommend or influence a tangible employment action. *See Browne*, 2003 U.S. Dist. LEXIS 18018, at *29-30. It is inconceivable that employers would accept the loss of efficiency that would result from personnel systems in which decisions are made without evaluations from day-to-day supervisors in order to avoid potential Title VII liability. *Id.* at *30.

CONCLUSION

For the reasons stated above and in Otis's Petition, this Court should grant Otis's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ALLAN B. TAYLOR
Counsel of Record
KENNETH W. GAGE
DAY, BERRY & HOWARD LLP
CityPlace
Hartford, CT 06103
(860) 275-0100

Counsel for Petitioner

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3. Mack also argues that Connolly should be considered a "supervisor" because Otis did not have an onsite supervisor. (Br. in Opp'n at 2.) Even if that were an accurate statement of the facts, (*but see* Pet. for a Writ of Cert. at 6 & n.4), nothing in Title VII or in *Ellerth* and *Faragher* suggests that every worksite must have a resident supervisor, or that in the absence of a supervisor, the senior employee will be considered a supervisor for the purpose of imposing vicarious liability on the employer.